IN THE MATTER OF LICENSE NO. 371539 MERCHANT MARINER'S DOCUMENT NO. 341061 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Wilfred H. FRANK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1868

Wilfred H. FRANK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 26 February 1971, an Examiner of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for three months plus three months on twelve months' probation upon finding proved a charge of misconduct. The specifications found proved allege that while serving as a third officer on board SS SANTA MAGDALENA under authority of the document and license above captioned, on 3 November 1970, Appellant, when the vessel was at Guayaquil, Ecuador,

(1) committed an assualt and battery on the Chief Officer, one John T. Russell, by offering to strike him with his fist, by grabbing his shirt lapel, and by kicking him about the body, and

(2) wrongfully threatened the Chief Officer.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of three witnesses and voyage records of SANTA MAGDALENA.

In defense, Appellant offered in evidence his own testimony, voyage records of SANTA MAGDALENA, and medical records from the U.S. Public Health Service.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of three months plus three months on twelve months' probation.

The entire decision was served on 9 March 1971. Appeal was timely filed on 15 March 1971. Although he had until 5 July 1971 to add to his original notice of appeal, Appellant has waived his right to do so.

FINDINGS OF FACT

On 3 November 1970, Appellant was serving as a third officer on board SS SANTA MAGDALENA and acting under authority of his license and document while the ship was at Guayaquil, Ecuador.

At about noon on that date Appellant was on the bridge of the vessel as the deck watch officer while preparations, including steering gear and whistle tests were being made to get underway at such time as the pilot came aboard. The steam whistle stuck in the open position. When the master came to the bridge to see what was amiss, he found Appelant making extremely vulgar remarks about the condition of the ship. [The Examiner made no findings as to the exact language used, only as to the nature of the language, referring to the record for precise detail. There is no fault here in failure to quote the language since the words used do not constitute part of the offense alleged but are indicative only of the mental attitude of Appellant at the time.] The difficulty with the whistle was taken care of.

At about 1250 the chief officer, John T. Russell, arrived on the bridge. The pilot had not yet reported, although the vessel was scheduled to sail at 1300. Appellant was telling another third officer of the terrible condition of the ship. The chief officer ordered Appellant to go aft to his station for unmooring. When Appellant continued his complaints to the other third officer, the chief officer again ordered aft, and told him that if he did not like the ship he should leave it on return to New York. Appellant threw his cap down on the deck and invited the chief officer "to the dock." The chief officer pointed to the door of the chart room, the shortest route by which to leave the ship.

The chief advised the master of the "invitation" of Appellant. The master did not intervene. Appellant entered the chart room. The chief officer followed about four feet behind. In the chart room Appellant turned to face the chief officer, grabbed him by the shirt, and drew back his fist to strike. The chief officer closed with him and about a dozen blows were exchanged, with Appellant kicking the chief officer. Both went to the deck and the struggle continued with one and then the other on top. The disturbance was stopped by the arrival of two radio officers. At the urging of one of the radio officers, the two combatants shook hands. Before the parties left the chart room, however, Appellant stated to the chief officer that the knew where he lived and would "take care" of him.

Shortly thereafter, when both had gone below to change shirts, Appellant told the chief officer that he would blow him out of his room and that later he would take care of the master.

The chief officer reported the fracas to the master almost immediately. Appellant, although he had two direct personal contacts with the master during the next fifteen hours, made no mention of the episodes. When the master asked him for a written statement on 4 November, Appellant submitted an irrelevant diatribe. Later he submitted a statement differing in essential details from that of the chief officer.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged only that the decision rendered is contrary to the weight of the evidence and that the "punishment" is excessive. No specific errors are alleged.

APPEARANCE: Zwerling & Zwerling, New York, N.Y., by Irving Zwerling, Esq.

OPINION

Since Appellant has chosen not to specify which items of evidence the Examiner failed to give proper weight to, whether pro or con Appellant, I am at a loss to find seriously presented grounds for appeal. There is no doubts that the decision must turn on the direct evidence of the chief officer as against the direct evidence of Appellant since no other eyewitness to the physical combat (the far more important allegation in this case) existed until the intervention of the radio officers. The matter, then, is as simple as this: if the chief officer is believed, the charge was proved; if Appellant is believed, the charges should be dismissed.

In order to permit examiners freedom to evaluate evidence and to encourage intelligent initial decisions on the record, I have always followed the rule that if the evidence on which the examiner relied is substantial evidence, of a "reliable" and "probative" nature, I will not substitute my judgment for his since he has had the opportunity to see and hear the witnesses, unless the evidence on which he relied is so inherently implausible as to render its use arbitary and capricious.

In this case the testimony of the chief officer is not inherently implausible, and that fact, by itself, is enough for me to support the Examiner's findings.

I may also add this, however, that the evidence presented by Appellant tends to be inherently implausible. The Examiner has, in a closely reasoned opinin which I adopt, explained his reasons for his decision. This is not a close case to be untimately decided, as is possible, on the grounds that reasonable men may differ, with the result that the decision of the trier of facts, a reasonable man, should be affirmed. The Examiner's meticulous scrutiny of the record makes the case overwhelming as to credibility and reliability of the witnesses. This may explain why Appelant attempted no specific attack on the Examiner's findings but left his appeal only on the vague grounds that it was "contrary to the weight of the evidence."

II

As to the asserted excessive character of the alleged "punishment" two things may be said. The first is that an order of suspension in hearing under R.S. 4450 and 46 CFR 137 is not a "punishment." It is a remedial order designed to prevent dangers, disorders, and threats to safety in the American merchant marine. The second is that an assualt and battery by one officer of a ship like SANTA MAGDALENA upon his superior, in the circumstances found, could well have merited greater reproof. That Appellant's conduct jeopardized his vessel cannot be denied. The order could even be considered lenient.

III

One subject, not raised on the appeal, may be mentioned here.

The Specification relative to the assualt and battery originally read that Appellant did:

> "...wrongfully strike a fellow crewmember, John T.Russell, chief mate, in the face with your fist and kick him about the legs."

The Examiner's findings, as reflected in my statement above of the first specification as found proved, effectively amended the specification to read as I have stated the case. The Examiner correctly, and this is the first time that I have seen this done in an appealed case, cited Kuhn v Civil Aeronautics Board, CA D.C. (1950), 183 F. 2nd 839, as the basis for his findings in deciding that the litigated matters authorized the findings be made despite the fact that the pleadings were worded otherwise.

While I do not dispute the Examiner's authority to do what he did, I question whether he had to do it in this case.

There was evidence that the chief officer struck the first blow in the interchange albeit only after having been seized by the shirt and positioned for the striking of a blow with a fist. It is quite clear that if the first blow with a fist was struck by the chief officer it was done in legitimate self-defense.

The Examiner's finding differ from the allegations only in these respects:

(1) he does not find striking with a fist, and

(2) he does find seizing by the shirt not alleged, and an attempt to batter with a fist.

The Examiner did find, however, that the allegation of kicking was proved. In effect, he found that the allegation of assualt and battery by beating with a fist was not proved. Yet he found that the kicking after the affray had begun, was proved, while he found, correctly and unmistakely, that "blows," which I can only construe, in the context, as blows struck by fists wherever they landed, were exchanged.

The point I wish to make here is that once an assualt has been found proved every action by the victim in self-defense is justifiable up to the point that it exceeds the amount of force needed reasonably to cause the assailant to desist, while every action of the assailant up to that point is chargeable as an impermissible battery.

I can see in this record no reason why battery by fist should not have been found proved in addition to battery by kicking, since Appellant was obviously using his fists while the assailed person was using no more than legitimate self-defense.

IV

I need not explore thoroughly here, because of Appellant's reticence on appeal, the question of whether the element of consent entered the picture by the victim's agreeing to meet Appellant "on the dock. "I recognize that certain civil batteries may be understood to be permitted or consented to, as when my neighbor falls against me in a bus. I recognize also that there is a school of thought that would hold "boxing" illegal, as against public interest, on the grounds that no person has the right to consent to be battered into insensibility. I recognize further that in some cases I have found "fighting" between seamen to be the offense "mutual combat," especially when an aggressor could not be identified, but the mutuality of the combat was apparent. I have never ruled out the possibility that there can be mutual assaults

and batteries in such cases.

In the instant cases I can only note that the apparent permission of the chief mate to engage in mutual combat "on the dock," however repugnant the idea that a chief officer of a passenger vessel should consent to such activity, and however repugnant the thought that a master having knowledge of such a plan should not intervene (matters adequately discussed by the Examiner in his opinion), is not a consent to be assualted and battered at some other time and place. In the context of the instant case, a consent to leave the vessel and fight ashore is not a consent to be assualted and battered in the very next compartment of the vessel through which the persons were passing in order to get ashore.

ORDER

The order of the Examiner date at New York, N.Y., on 26 February 1971, is AFFIRMED.

C.R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 3rd day of February 1972.

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